IN THE HIGH COURT OF JUDICATURE AT BOBBY

CIVIL APPELLATE JURISDICTION

WRIT PETITION NO. 8463 of 2006

Shri Laxmi Narayan Shukla ..Petitioner

(Org. Defendant)

vs

The Board of trustee of Bombay

Port Trust, Mumbai .. Respondent

Mr.Sanjay Kumar Singh for the Petitioner

Mr.U.J.Makhija i/b Ms Mulla and Mulla and Cr. B C. for the Respondent

CORAM:S.R.SATHE,J.

DATED:10th Sept. 2007

P.C.:-

1. Heard both the learned Advocates.

2. The Appellant-applicant in Misc. Notice No.311 of 2005 in Appeal No.259 of 2002, filed in the Court

of Small Causes at Bombay has filed this petition to challenge the order passed by the Division Bench of the small Causes court whereby Misc. Application filed by the present Petitioner for setting aside the dismissal order passed in appeal No.259 of 2002 and for rehearing of the said appeal was conditionally allowed. For the sake of convenience hereafter the parties shall be referred to as the Petitioner and the Respondent.

3. Brief facts giving rise to this petition are as under :-

. The Respondents-Port of Trust, Bombay filed Suit under Section 41 of the Presidency Small Causes court Act against the Petitioner for recovery of possession of the suit premises and arrears of rent. The suit premises i.e. plot no.6, admeasuring 163.38 sq.mtr situated at Coal Depot, Mazgaon Sewree Reclamation Estate, Bombay, was leased out by the Respondent Bombay Port Trust (in short, BPT), to the Petitioner. The said suit was decreed ex-parte against the Petitioner on 7-11-1996. The Petitioner, therefore, filed Misc. Notice No.448 of 1998 to set aside the

said ex-parte decree. However, the said Misc. notice also came to be dismissed.

4. Being aggrieved by the same the Appellant filed Appeal bearing No.259 of 2002. The said appeal was admitted and was fixed for hearing from time to time. Finally the said appeal also came to be dismissed on 29-10-2005 as the Petitioner and his advocate were absent. The Petitioner, therefore, filed Misc. Application No.311 of 2005 stating therein that Appeal No.259 of 2002 was fixed for hearing on 28-9-2005 but at that time Petitioner had gone to Uttar Pradesh and there he became sick and as such could not attend the court. According to the Petitioner the appeal was fixed for orders on 29-10-2005. He was in fact present in the Court when the matter was called. Petitioner went to call his Advocate but on his return he found that the appeal was dismissed. He, therefore, prayed that the appeal No.259 of 2002 be restored.

5. The Respondent BPT filed their affidavit in reply and opposed the application. They contended that there was no sufficient reason for the Petitioner to

remain absent and no sufficient ground is shown by the Petitioner to set aside the said order passed on 29-10-2005. They also contended that the Petitioner has in fact created third party interest in the said property and when Respondent BPT made an attempt to execute the decree obstruction was raised by the said third party. The respondent therefore contended that the application filed by the Petitioner is in fact not bonafide and he is only trying to delay the matter and creating hurdle in securing possession of the Respondent-BPT. The Respondent therefore prayed for dismissal of the petition.

6. The Respondent filed rejoinder and submitted that BPT has taken the possession and handed over the same to a person by name Jogindar Singh and they are collecting amount of Rs.10,000/- per month from him. At the same time the Petitioner submitted in his rejoinder that he is ready and willing to pay arrears of rent and the suit premises is his only source of income. He also submitted that the Respondent in fact gave wrong address of the Petitioner and it was shown that the notice has been served on the said address and thus Respondent committed fraud. He,

therefore, submitted that the appeal be restored.

7. After perusing the record and documents filed by the parties and hearing the arguments of both the learned Advocates the Division Bench of the Small Causes court came to the conclusion that the reasons set out by the petitioner in his application are not sufficient grounds for setting aside the dismissal order of the appeal. They, however, observed that if in the interest of justice the appeal is to be restored then it should with condition that the petitioner should deposit entire amount of arrears of rent. They therefore passed the following order :-

ORDER

> The notice is made absolute. The order of dismissal of the appeal passed on 29th October, 2005, stands set aside, on the condition that the appellant/defendant to deposit the entire amount of the claim of Rs.6,77,999/- without prejudice to the rights and contentions of both the parties on or before 20th July, 2006. The said

order is condition precedent.

Failing to deposit the amount of Rs.6,77,999/- within the said stipulated time the Misc. Notice No.311 of 2005 stands dismissed.

The appeal is restored and adjourned on 26th July, 20060 at 11-00 a.m. for hearing or order"

8. Being aggrieved by the above mentioned order the Petitioner has filed present petition.

9. In this petition before me Shri Sanjay Kumar Singh, learned Advocate for the Petitioner has urged only two points. Firstly, he submitted that the learned Judge of the Small Causes court ought to have taken into consideration the fact that there was no proper service of the suit summons on the defendant i.e. present petitioner. Secondly, he canvassed before me that the Respondent BPT have already obtained the possession of the suit property, so

there was no necessity to pass the conditional order. He, therefore, submitted that petition be allowed and the order passed by the Small Causes court regarding condition of depositing of amount be set aside.

10. As against this,Shri Makhija,learned Counsel for the BPT submitted that the present petition is misconceived and that is nothing but at an attempt to protract the litigation and handing over of possession. He also submitted that though the decree is passed in 1996 the Petitioner is not handing over the possession and protracting handing over of possession on one ground or the other. He also submitted that the petition is not at all bonafide. According to him the Petitioner is in fact not interested in the premises and he has already created third party interest and taking huge amount from the third party. He, therefore, submitted that the petition be dismissed.

11. From the facts mentioned above it is apparent that the Petitioner was in fact not at all vigilant in prosecuting his appeal. It must be noted that though he has alleged that he had gone to Uttar

Pradesh at the relevant time and had fallen sick and as such could not return to Bombay and attend the Court, he has not adduced any evidence in that behalf. Though it was his contention that on 29-10-2005 he was present in the court and when the matter was called he had gone for calling his Advocate but when he returned he found that matter was dismissed, he has also not adduced in evidence in this behalf. He could have even filed an affidavit of his Advocate to show that on that day. He had come to the court but he has not done so. Under the circumstances, the Small Causes court Bombay has rightly observed that the reasons set out by the Petitioner in his Misc. Notice are not sufficient and reasonable grounds. Having so held it was in fact not necessary for the Small Causes Court to allow the said application and to impose the condition. However, having noticed that the Petitioner tenant is unnecessarily protracting the matter and who was in fact in arrears of rent only with a view to give an opportunity to the Petitioner the Small Causes court has passed the conditional order and allowed the said application subject to the Petitioner depositing the entire amount of claim of

Rs.6,77,999/- within a particular time. It was also made clear that payment of such amount is a condition precedent and failing which the Misc. Notice No. 311 of 2005 shall stand dismissed. It is pertinent to note that though this order was passe don 8-6-2006 and the period granted to him to deposit the amount was upto 26-7-2006 he challenged the said order by this petition on 6-10-2006. So, this also indicates that the petitioner was in fact not vigilant and he intends to protract the litigation. Though the Petitioner is saying that the Respondent BPT has received the possession of the suit property. He has not produced even a single document to show that the Respondent BPT has received the possession of the suit property. On the contrary, we find that when Respondent BPT tried to secure possession in execution proceedings, some third party raised an obstruction and as a result of the same Respondent was required to take out Obst.Notice No.44 of 1998 for removing the said obstruction. The said obstruction notice was made absolute on 10-9-1999. However, the Petitioner has suppressed all these facts. So, if the Petitioner has lost possession of the suit premises in such fashion and by suppressing

the said facts he is trying to secure the said possession again. The Court was justified in passing the conditional order.

12. Under the circumstances of the case the said order cannot be said to be illegal. It is, therefore, not necessary to interfere with the said order.

13. Hence, I pass the following order :-

. The petition is dismissed.

(S.R.SATHE,J.)